KTM Transformers Sdn Bhd v N Chanthiran a/l Nagappan

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(IM)(NCVC)-1885–11 OF 2014
ABDUL WAHAB PATAIL, LINTON ALBERT AND ZAKARIA SAM JJCA
28 MAY 2015

Tort — Defamation — Libel — Company sued liquidator of another company in his personal capacity for libel — Company did not obtain leave of winding up court before filing suit — Whether High Court right to strike out company's suit for failure to obtain leave — Whether liquidator demonstrated he was acting in course of his duties as liquidator when alleged libel was committed — Whether company should have applied for leave to sue as only winding up court had facts before it to determine whether or not liquidator was acting bona fide qua liquidator when alleged libel was committed

The respondent was the court-appointed liquidator of a company named STM Transformers Sdn Bhd. The appellant was not under any liquidation. Both STM Transformers Sdn Bhd and the appellant had a common director. When a notice issued on the respondent's behalf addressed to 'To Whom It May Concern' referred, inter alia, to a factory lot owned by the appellant (the notice did not mention the appellant's name), the latter considered itself defamed and sued the respondent for libel and/or trespass and for damages flowing therefrom. On the respondent's application, the High Court struck out the appellant's writ and statement of claim on the ground leave of the winding up court was not obtained before the suit was filed. In the instant appeal against the decision, the appellant maintained, as it did in the court below, that leave was not required because the respondent was sued in his personal capacity and not qua liquidator.

Held, dismissing the appeal and affirming the decision of the High Court with costs of RM5,000:

(1) The respondent had established that he was acting in the course of his duties as liquidator when the appellant's property ('the factory lot') was included in the notice. It was only the winding up court, which had the facts of the winding up before it, that could correctly determine whether or not the respondent was acting bona fide in his capacity as liquidator of STM Transformers Sdn Bhd in respect of the factory lot and to decide whether or not to grant leave to the appellant to sue the liquidator (see para 14).

(2) The submission that the appellant was entitled to sue the respondent in his personal capacity and that therefore no leave was required, if accepted,

would introduce an anarchic process that would interfere with the carrying out of a receiver's or liquidator's functions. There was no error on the part of the High Court in striking out the suit and in giving liberty to the appellant to file afresh if it obtained the requisite leave from the winding up court (see para 15).

[Bahasa Malaysia summary

Responden adalah likuidator yang dilantik oleh mahkamah terhadap syarikat yang bernama Transformers Sdn Bhd. Perayu bukan di bawah apa-apa likuidasi. Kedua-dua STM Transformers Sdn Bhd dan perayu mempunyai pengarah yang sama. Apabila notis dikeluarkan bagi pihak responden ditujukan kepada 'To Whom It May Concern' dirujuk, antara lain, kepada lot kilang yang dimiliki oleh perayu (notis tidak menyatakan nama perayu), perayu menganggap ianya difitnah dan menyaman responden untuk fitnah dan/atau menceroboh dan untuk ganti rugi berbangkit daripadanya. Atas permohonan responden, Mahkamah Tinggi membatalkan writ dan pernyataan tuntutan perayu atas alasan kebenaran mahkamah penggulungan tidak diperolehi sebelum tindakan difailkan. Dalam rayuan ini terhadap keputusan, perayu mengekalkan, seperti yang ia lakukan di mahkamah bawahan, bahawa kebenaran tidak diperlukan kerana responden disaman atas kapasiti persendiriannya dan bukan sebagai likuidator.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi dengan kos sebanyak RM5,000:

(1) Responden telah membuktikan bahawa dia bertindak dalam perjalanan dutinya sebagai likuidator apabila hartanah perayu ('lot kilang') dimasukkan dalam notis tersebut. Ia hanya mahkamah penggulungan, yang mempunyai fakta penggulungan di hadapannya, yang dapat menentukan dengan betul sama ada atau tidak responden bertindak bona fide dalam kapasitinya sebagai likuidator STM Transformers Sdn Bhd berkaitan lot kilang dan untuk memutuskan sama ada atau tidak untuk memberikan kebenaran kepada perayu untuk menyaman likuidator (lihat perenggan 14).

(2) Penghujahan bahawa perayu berhak untuk menyaman responden dalam kapasiti persendiriannya dan bahawa oleh itu kebenaran tidak diperlukan, jika diterima, akan memperkenalkan proses berunsur anarki yang akan campur tangan dengan menjalankan fungsi penerima atau likuidator. Tidak terdapat kesilapan bagi pihak Mahkamah Tinggi dalam membatalkan tindakan tersebut dan dalam memberi kebebasan kepada perayu untuk memfailkan semula jika ia memperolehi kebenaran yang diperlukan tersebut daripada mahkamah penggulungan (lihat perenggan 15).]]]]]

Notes

For cases on libel, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 575–793.

Cases referred to

Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow [1995] 3 MLJ 204; [1995] 4 CLJ 11, CA (refd)

Maidstone Palace of Varieties, Limited, Blair v Maidstone Palace of Varieties, Limited, In re [1909] 2 Ch 283, Ch D (refd)

Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors [2009] 3 MLJ 191; [2010] 2 CLJ 858, CA (refd)

Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd [1992] 2 MLJ 233; [1992] 1 CLJ Rep 381, SC (refd)

Legislation referred to

Companies Act 1965 ss 183, 185, 226, 229, 305
Companies (Winding-Up) Rules 1972 r 63
Rules of Court 2012 O 18 r 19

Appeal from: Suit No KCH-23NCvC-4/7 of 2014 (High Court, Kuching)

Lim Heng Choo (Roger Chin with him) (Lim & Lim Advocates) for the appellant.
Alvin Chong (Alvin Chong & Partners Advocates) for the respondent.

Abdul Wahab Patail JCA:

[1] The appellant, KTM Transformers Sdn Bhd appealed against the striking out of its suit KCH-23NCvC-4/7 of 2014, inter alia, pursuant to ss 305 and 226 of the Companies Act 1965, r 63 of the Companies (Winding-Up) Rules 1972 and O 18 r 19 of the Rules of Court 2012 by the High Court of Sabah and Sarawak at Kuching.

[2] The appellant had filed a claim against the respondent N Chanthiran a/l Nagappan for libel and/or trespass and damages flowing therefrom arising out of a letter dated 26 June 2014 written by one Saravanan a/l Dato' Sangaralingam on behalf of the defendant, N Chanthiran a/l Nagappan, addressed to 'To Whom It May Concern' as follows:

> STM TRANSFORMERS SDN BHD (183369-X)
>
> [In Compulsory Liquidation]
>
> C/O Dept. of Corporate Finance
>
> Chanthiran & Co
>
> No. 176. 1st Floor, Jalan Song Thian Cheok. 93000 Kuching.
>
> Tel: 082-417477 Fax: 082-41133

Date: 26th June 2014

To Whom It May Concern:

Dear Sir,

Re: Authorization Letter

We refer to our letter dated 15th July 2013 and the police report lodged on 29th May 2013. I hereby authorize Mr. Tan Kwang Wei (NRIC NO. 721017-13-5009) to fully act on all matters related to the security of the factories, protection of the assets of STM Transforms factories at:

Lot 1976, Section 66. Jalan Semangat. Pending Industrial Estate, Kuching

Lot No. 2, Export Oriented Industrial Zone, Phase 2, Kota Kinabalu Industrial

Factory Lot, Provisional Lease Lot 1229, Block 8, Muara Tebas Land District.

Please contact me at 0163113061, if you need any clarification.

Thank you.

Yours faithfully.

.....

Saravanan a/l Dato' Sangaralingam (NIRC No. 770320-10-5145)

Head of Compliance and Operations

On behalf Mr. Chanthiran Nagappan

The Liquidator

[No. 2007/04/16(J/PH)]

[3] The respondent is a court-appointed liquidator for STM Transformers Sdn Bhd. The appellant is a separate legal entity registered under the Companies Act 1965 under the name of KTM Transformers Sdn Bhd, and not under any liquidation for which the respondent was appointed.

[4] The respondent filed a notice of application to strike out the writ and statement of claim on the grounds that the plaintiff has failed to obtain the requisite leave from the winding up court in KCH-28-13/5 of 2014 prior to commencing its action.

[5] The sole issue at the High Court and on appeal is whether leave of the winding up court was required. The appellant submitted that no leave is

A required because the action filed against the defendant is in his personal capacity and not in his official capacity as a liquidator.

[6] Section 185 of the Companies Act provides for appointment of a liquidator as receiver:

B

Appointment of liquidator as receiver

185 Where an application is made to the Court to appoint a receiver on behalf of the debenture holders or other creditors of the company which is being wound up by the Court, the liquidator may be so appointed.

C

[7] Section 185 thus authorises the appointment of a liquidator as a receiver on behalf of the debenture holders or other creditors of the company which is being wound up by the court.

D

[8] The liability of a receiver is provided under s 183 of the Companies Act:

Liability of receiver

183(1) Any receiver or other authorized person entering into possession of any assets of a company for the purpose of enforcing any charge shall, notwithstanding any agreement to the contrary, but without prejudice to his rights against the company or any other person, be liable for debts incurred by him in the course of the receivership or possession, for services rendered, goods purchased or property hired, leased, used or occupied.

E

F (2) Subsection (1) shall not be so construed as to constitute the person entitled to the charge a mortgagee in possession.

Application for directions

(3) A receiver or manager of the property of a company may apply to the Court for directions in relation to any matter arising in connection with the performance of his functions.

G

(4) Where a receiver or manager has been appointed to enforce any charge for the benefit of holders of debentures of the company any such debenture holder may apply to the Court for directions in relation to any matter arising in connection with the performance of the functions of the receiver or manager.

H

[9] Control of liquidators who are not the official receiver is provided by s 229:

Control of unofficial liquidators by Official Receiver

I

229(1) Where in the winding up of a company by the Court a person other than the Official Receiver is the liquidator, the Official Receiver shall take cognizance of his conduct and if the liquidator does not faithfully perform his duties and duly observe all the requirements imposed on him by any written law or otherwise with respect to the performance of his duties, or if any complaint is made to the Official Receiver

by any creditor or contributory in regard thereto, the Official Receiver shall inquire into the matter, and take such action thereon as he may think expedient.

(2) The Official Receiver may at any time require any such liquidator of a company which is being wound up by the Court to answer any inquiry in relation to any winding up in which he is engaged, and may, if the Official Receiver thinks fit, apply to the Court to examine him or any other person on oath concerning the winding up.

(3) The Official Receiver may also direct a local investigation to be made of the books and vouchers of such liquidator.

[10] In short, the liquidator is answerable to the winding up court for his actions.

[11] The distinction sought to be made in the instant case is that he is sued in his personal capacity and therefore no leave is required from the winding up court.

[12] We considered the submission that the appellant was entitled to choose to sue N Chanthiran a/l Nagappan as defendant in his personal capacity, and therefore no leave was required. We arrived at the conclusion that in as much as it is the appellant's right to commence an action against N Chanthiran a/l Nagappan as defendant, it is equally N Chanthiran a/l Nagappan's right as the named defendant, to apply to strike out the appellant's claim on the grounds that he was acting as a liquidator and that leave of the winding up court was required. That such leave is ordinarily required is established by the Supreme Court in *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233; [1992] 1 CLJ Rep 381 (SC) and the Court of Appeal in *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204; [1995] 4 CLJ 11.

[13] In our view, had the application been on that basis alone, it ought to be struck out, since it was not the appointment as liquidator that creates or grants the protection but whether the liquidator's acts were in the course of carrying out his functions as liquidator. In this case, the record shows that:

(a) the difference in the name is minimal, the appellant being KTM Transformers Sdn Bhd and the company in liquidation STM Transformers Sdn Bhd;

(b) there is a common director between the two entities; and

(c) the 'To Whom It May Concern' letter of 26 June 2014 did not mention the appellant's name but that of STM Transformers Sdn Bhd.

[14] The respondent had therefore established he was acting in the course of his duties as liquidator when the appellant's property, being the factory lot,

Provisional Lease Lot 1229, Block 8, Muara Tebas Land District ('the factory lot'), was included in the notice. In that regard, it is only the winding up court, with the facts of the winding up before it, that can correctly determine whether N Chanthiran a/l Nagappan was bona fide acting in his capacity as liquidator of STM Transformers Sdn Bhd or not in respect of the factory lot, and to decide whether to grant leave to the appellant to sue the liquidator of STM Transformers Sdn Bhd or not. Only the winding up court can determine if the factory lot was part of the assets of STM Transformers Sdn Bhd or not, and whether leave should be granted before an action can be brought against a liquidator 'with reference to his conduct in the discharge of the duties of his office, whether right or wrong' (per Neville J in *In re Maidstone Palace of Varieties, Limited, Blair v Maidstone Palace of Varieties, Limited* [1909] 2 Ch 283, and quoted in *Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors* [2009] 3 MLJ 191; [2010] 2 CLJ 858 (CA) where it was held:

> The proper remedy for any one aggrieved by his conduct is to apply to this court in the action in which he was appointed. If any wrong has been done by the officer, the court will no doubt see that justice is done, but no one has a right to sue such an officer in another court, without the sanction of this court.

[15] In our view, the submission that the appellant was entitled to choose to sue N Chanthiran a/l Nagappan as defendant in his personal capacity, and therefore no leave was required if accepted would introduce an anarchic process that will interfere with the carrying out of a receiver's or liquidator's functions. We, therefore, found no error on the part of the High Court to have made the order that:

> On this ground alone, I allow the application for striking out but given that I do not decide on the merits of the claim, I would add in the order that the plaintiff be at liberty to file afresh should it obtain the requisite leave from the winding up court. As for costs, I fixed the same at RM8,000 for the defendant.

[16] Accordingly, we dismissed the appeal, affirmed the order of the High Court, fixed costs in the sum of RM5,000 and ordered that the deposit be refunded to the appellant.

Appeal dismissed and decision of the High Court affirmed with costs of RM5,000.

Reported by Ashok Kumar